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CHAPTER 1- INTRODUCTION TO SUSTAINABLE DEVELOPMENT

1.1 Introduction

The idea of sustainable development is not a new one; there has always been the fear that the over-exploitation of natural resources and its impact on the environment would result in the inability of present and future generations to maintain the environmental conditions under which they live.¹ The international community has been increasingly forced to recognise that the current condition of the environment is a global concern.² Developing alongside this recognition is an awareness of the relationship between economic growth/ trade liberalisation and the environment.³ While economic development and environmental conservation were initially seen as conflicting ideas, the concept of sustainable development emerged with the idea of compromise by seeing the two as interdependent and mutually reinforcing.⁴

The debate on trade and the environment necessarily involves international trade organisations and how their policies affect the environment. To this end a large part of the trade and environment debate has involved the World Trade Organisation (WTO) and its approach to trade measures that relate to environmental protection. A large part of this debate has been focused on whether its treatment of non-product related Process and Production Methods are in line with the goal of sustainable development.

What follows is a brief introduction on sustainable development and trade.

1.2 Sustainable development

Sustainable development is based on the understanding that underdevelopment in combination with poverty may have the effect of causing the

¹ Jacobus A. Du Pisani, 'Sustainable development- historical roots of the concept', *Environmental Sciences*, Vol. 3, No 2 (2006) 83-96 at 83.

² Dominic A Gentile, 'International Trade and the Environment: What is the Role of the WTO?', *Fordham Environmental Law Review*, Vol. 19 No 1 (2009) 195- 230.

³ *Ibid.*

⁴ World Commission on Environment and Development, 'Our Common Future', Oxford University Press (1987); Declaration of the United Nations Conference on the Human Environment U.N. Doc. A/Conf. 48/14/ Rev. 1 (1973) and Rio Declaration on Environment and Development U.N. Doc. A.CONF. 151/26 (1992).

deterioration of the environment which in turn poses a threat to development itself.⁵ Conversely there is also the understanding that economic growth can lead to the creation of patterns that diminish natural resources, limiting the availability of natural wealth and resources and the capacity of humans to sustain themselves.⁶ Based on these understandings, the core concept of sustainable development is an approach to development that balances different and competing needs against the environmental, social and economic limitations faced by society. The principle of sustainable development promotes the idea of living within our environmental means.

The popularisation of modern sustainable development is the result of the Brundtland Commission's report 'Our Common Future' published in 1987.⁷ The group was commissioned by the UN to develop long-term environmental strategies for the international community and its resulting report is seen as a watershed that enabled sustainable development to become a broad global policy objective.⁸ The report pointed to poverty as one of the causes of environmental degradation and argued for greater economic growth through increased trade so as to reverse this.⁹ It also argued for the integration of human development and environmental degradation and suggested that they had to be resolved simultaneously and in a mutually reinforcing way.¹⁰ The report discussed the need to apply integrated sustainable solutions to a broad range of problems and acknowledged the tension between economic growth and environmental protection. It concluded that economic growth was essential but that there should be a move towards sustainable development which would be environmentally sound. All these themes and tension were summarised into what has become the most popular and accepted definition of sustainable development; 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs'.¹¹ This echoes other definitions in reflecting the need to integrate the goals of economic

⁵John C Dernbach, 'Sustainable Development as a Framework for National Governance', Case Western Reserve Law Review, Vol 49 No 1 (1998) 1- 103 at 25.

⁶ Ibid.

⁷ World Commission on Environment and Development, 'Our Common Future', Oxford University Press (1987).

⁸ Ibid note 5.

⁹ Ibid note 7.

¹⁰ Ibid note 7 at para 40.

¹¹ Ibid note 7 at para 27.

development with the protection of the environment in order to preserve the ability of future generations to maintain their well-being.¹²

The core lesson of the Brundtland report was that sustainability has to be an integrated concept. That ‘solutions that address only environmental, only social or only economic concerns are radically insufficient. What is needed is a form of transdisciplinary thinking that focuses on the connections among the fields as much as on the contents of those fields’.¹³ It has become a resounding call for economic development and growth to be achieved in a manner consistent with the sound management of natural resources. It sees a balance between the two as the condition for the survival of both.¹⁴

1.3 Source of sustainable development

While the definition of sustainable development provided by the Brundtland report is the most widely recognised and is usually the starting point of discussions on sustainable development, there has been a build up to that point. This has been largely through the production of soft law, which adds more detail to the objectives of sustainable development.

The most notable of these began with the Stockholm Declaration,¹⁵ which was the result of the 1972 Stockholm Conference on the Human Environment. The Conference had the goal of providing guidelines for action to be taken by states and international organisations in relation to human interactions with the environment. To this end the conference produced a set of principles looking at the relationship between the environment and trade and how the environment may be preserved. Principle 2 of the Declaration laid down the idea of intergenerational equity in regards to natural resources, which is echoed by the Brundtland report, by providing that the natural resources must be safeguarded for the benefit of present and future

¹² David Luff, ‘An overview of international law of sustainable development and a confrontation between WTO rules and sustainable development’, *Belgian Review of International Law*, Issue 1 (1996) 90-144.

¹³ John Robinson, ‘Squaring the circle? Some thoughts on the idea of sustainable development’, *Ecological Economics*, Vol. 48 (2004) 369-384 at 371.

¹⁴ John C Dernbach, ‘Sustainable Development as a Framework for National Governance’, *Case Western Reserve Law Review*, Vol 49 No 1 (1998) 1- 103 at 25.

¹⁵ Declaration of the United Nations Conference on the Human Environment U.N. Doc. A/Conf. 48/14/ Rev. 1 (1973).

generations through careful planning or management.¹⁶ Principle 8 set the general background for development and stated that ‘economic and social development is essential for ensuring a favourable living and working environment and for creating conditions on earth that are necessary for the improvement of the quality of life’.¹⁷ Principle 13 of the Declaration was important as it endorsed the integrated approach which can be seen in the Brundtland report. It provided that in order to manage resources in a rational way so as to improve the environment, states ‘should adopt an integrated and coordinated approach to their development planning so as to ensure that development is compatible with the need to protect and improve environment for the benefit of their population’.¹⁸

Taken together, all the principles of the Stockholm declaration emphasised the necessity of economic development to take place in conjunction with environmental protection. These principles were further developed and given shape by the Rio Declaration.¹⁹ The United Nations Conference on Environment and Development, (the Rio Summit), focused on the vital role international trade plays in combatting poverty and promoting the concept of sustainable development. One of the outcomes of the Summit was the Rio Declaration, which effectively brought sustainable development into the legal sphere. Although the principles of the Rio Declaration are non-binding, they are formulated in strong legal terms so that they are ‘seen as the keystone of the conceptual articulation of sustainable development’²⁰.

The Rio Declaration also adopted the concept of development and environmental protection being mutually reinforcing by providing that, ‘in order to achieve sustainable development, environmental protection shall constitute an integral party of the development process and cannot be considered in isolation from it’.²¹ However, the Declaration is more explicit in providing the direction states should be moving towards by stating that in order ‘to achieve sustainable development and higher quality of life for all people, states should reduce and eliminate unsustainable patterns of production and consumption and promote

¹⁶ Declaration of the United Nations Conference on the Human Environment U.N. Doc. A/Conf. 48/14/ Rev. 1 (1973) at para 2.

¹⁷ Ibid at para 8.

¹⁸ Ibid note 16 at para 13.

¹⁹ Rio Declaration on Environment and Development U.N. Doc. A.CONF. 151/26 (1992).

²⁰ Virginie Barral, ‘Sustainable Development in International Law: Nature and Operation of an Evolutive Legal Norm’, *European Journal of International Law*, Vol. 23. No 2 (2012) 377-400 at 378.

²¹ Ibid note 19 at para 4.

appropriate demographic policies'.²² The call for the elimination of unsustainable patterns of production and consumption has since become a constant theme in the discourse on sustainable development and will be discussed further in the dissertation.

The Declaration continued to provide principles which have since become the core content of Sustainable development. These include the Precautionary principle,²³ the Polluter Pays principle²⁴ and the requirement to undertake Environmental Impact Assessments for activities that are likely to have adverse impacts on the environment.²⁵ The importance of these principles is that when they are applied, they participate in the integration of economic development and environmental protection and thus promote the advancement of sustainable development. Part of this plan for integration can be seen in the fact that the Declaration provides that these environmental protection principles must not be used by states as an excuse to take protectionist measures to close their markets.

The Rio Summit also produced Agenda 21 Plan of Implementation.²⁶ The document prescribes policies, programmes and processes for international organisations and governments to follow when implementing the recommendations of the Rio Declaration.

It is important to note that sustainable development is not devoid of meaning or normative value in international law. This is reflected in the *Gabcikovo Dam* case, decided in the International Court of Justice,²⁷ which stated that

...new norms and standards have been developed...such new norms have to be taken into consideration and such new standard given proper weight, not only when states contemplate new activities but also when continuing with activities begun in the past. This need to reconcile economic development with protection

²² Ibid note 19 at para 8.

²³ Principle 15 of the Rio Declaration provides that 'in order to protect the environment, the Precautionary approach shall be widely applied by states according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation'.

²⁴ The Polluter Pays principles promotes the internalisation of environmental costs, taking the 'approach that the polluter should, in principle, bear the cost of pollution with due regard to the public interest and without distorting international trade and investment'.

²⁵ Principle 17 of the Rio Declaration.

²⁶ Agenda 21, U.N. Conference on Environment and Development, U.N. Doc. A/Conf. 151/26/Rev.1 (Vol. 1), Annex 2 (1992) [hereinafter Agenda 21].

²⁷ The International Court of Justice in the judicial arm of the United Nations, it provides advisory opinion on legal matters and settles disputes submitted to it by UN member states.

of the environment is aptly expressed in the concept of Sustainable development.²⁸

This understanding was expanded in the *Iron Rhine* case in which the Permanent Court of Arbitration balanced environmental protection against economic development and found that the enforcement of environmental measures by one state could not justify the denial of another state's right to development.²⁹ The reasoning of the court was that 'environmental law and the law on development stand not as alternatives but as *mutually reinforcing integral concepts which require that where development may cause significant harm to the environment, there is a duty to prevent, or at least mitigate such harm*'.³⁰ In the same case, the court linked sustainable development with the principle of integration and found that it required the 'prevention and mitigation of environmental damage when undertaking an economic development project, suggesting that to ensure sustainable development, a state will have to prevent and mitigate damage to the environment'.³¹ The International Court of Justice also suggested in the *Pulp Mills*³² case that sustainable development implies the cooperation of the parties in the prevention of environmental damage.³³

These cases, just as the principles discussed above, echo the need for integration as a way of achieving sustainable development. The implication of the cases is that where trade liberalisation intersects with environmental norms, sustainable development may play a normative role in producing a balanced/ mutually supportive, integrated outcome.³⁴

1.4 Sustainable development and trade

Environmentalists consider international trade as an accelerating factor, if not the proximate cause, of the over-exploitation of natural resource and ecological

²⁸ Gabčíkovo-Nagymaros Project (Hungary v. Slovakia). Judgment. ICJ. Reports, (1997) at para 140.

²⁹ *Award in the Arbitration regarding the Iron Rhine Railway between the Kingdom of Belgium and the Kingdom of the Netherlands*, 27 RIAA (2005) at para 59.

³⁰ Ibid.

³¹ Ibid note 20 at 187.

³² *Pulp Mills on the River Uruguay*, Argentina v Uruguay, 2006 ICJ Rep 113.

³³ Ibid note 20 at 187.

³⁴ Ibid note 20.

degradation.³⁵ As stated above, one of the principle tenets of sustainable development is to balance the competing interests of trade and the environment, as such there is a push for economic development and growth to be achieved in a way that is consistent with the sustainable management of natural resources. To this end, there has been a focus on how the World Trade Organisation (WTO), an organisation with the principal mandate of facilitating the move towards an open and non-discriminatory international trading system, interacts with the pursuit of sustainable development. The relationship between trade liberalisation and the environment means that it may sometimes be necessary for the WTO to delve into the realm of environmental issues. The interaction between trade and the environment is recognised in the preamble of the Marrakesh Agreement, which establishes the World Trade Organisation, when it provides that trade liberalisation should occur

while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development.³⁶

This recognition creates the expectation that WTO Dispute Bodies, when interpreting the General Agreement of Trade and Tariffs (the document that details the general obligation of WTO member states), would respect state policies that seek to promote sustainable development.

Preambular statements are not formally binding but they do play a role in the interpretation of a document, in particular when it comes to identifying the object and purpose of the legal document. The Doha Declaration reinforces sustainable development as an objective of the WTO.³⁷ It confirms that sustainable development needs to be integrated into the mandate of the WTO, which is largely an economic organisation. It does so by reaffirming the WTO's commitment to sustainable development. It states that the WTO is

³⁵ Tanyarat Mungkalarungso, 'The Trade and environment Debate', *Tulane Journal of International and Comparative Law*, Vol. 10 (2002) 361- 385 at 361.

³⁶ Marrakesh Agreement Establishing the World Trade Organization, 1867 U.N.T.S. 154, 33 I.L.M. 1144 (1994).

³⁷ Doha Declaration WT/MIN (01)/DEC/2.

‘convinced that the aims of *upholding and safeguarding an open and non-discriminatory multilateral trading system, and acting for the protection of the environment and the promotion of sustainable development can and must be mutually supportive*’.

The Declaration as well as the General Agreement on Trade and Tariffs also add that member states should not be prevented from adopting measures that protect the environment and animal or plant life, provided that such measures are not applied in ways that are ‘arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, and are otherwise in accordance with the provisions of the WTO Agreements’.³⁸

The Dispute Settlement Body of the WTO (which consists of Panels and Appellate bodies) has accepted the definition of sustainable development, recognised its importance and a broad global policy objective and has affirmed its commitment to sustainable development. In the 1998 *US Shrimp* case³⁹ the panel noted that the concept of sustainable development ‘has been generally accepted as integrating economic and social development and environmental protection’.⁴⁰ The 2001 *US Shrimp* case⁴¹ also recognised and accepted the Brundtland report’s definition of sustainable development and confirmed that sustainable development has a role to play in its interpretation of the GATT and assessment of whether states are in violation of WTO obligations.⁴²

But the WTO is a trade organisation, it is not an environmental organisation and does not aim to be one. As such it has only addressed environmental issues in so far as they stem from trade related measures with potentially discriminatory effects on trade. One of the biggest controversies in the trade/environment debate has been then WTO’s treatment of Process and Production Methods (PPMs). Since the decisions of the *Tuna-Dolphin* cases⁴³ under the General Agreement on Trade and

³⁸ Doha Declaration WT/MIN (01)/DEC/2, at para 6 and The General Agreement on Trade and Tariffs (1947) 55 UNTS 194; 61 Stat. pt. 5; TIAS 1700 Article XX.

³⁹ *United States- Import Prohibition of Certain Shrimp and Shrimp products* WT/DS58/AB/R (1998).

⁴⁰ *United States- Import Prohibition of Certain Shrimp and Shrimp products* WT/DS58/AB/R (1998) note 107.

⁴¹ *United States- Import Prohibition of Certain Shrimp and Shrimp Products* [WT/DS58/AB/RW](#) (2001).

⁴² *Ibid.*

⁴³ *United States- Restrictions on Imports of Tuna* DS21/R-39S155 and *United States-Restrictions on Imports of Tuna*, DS21/R, 30I.L.M. 1594.

Tariffs (GATT) system, the treatment of PPMs by the WTO has remained a concern for advocates of sustainable development.⁴⁴ It has been argued that the WTO's handling of the cases has been emblematic of the trade/environment debate in that trade liberalisation has been given a higher priority than the environment.⁴⁵ This position is largely due to the fact that the cases drew a distinction between products and the processes used to create them, and did not allow states to differentiate products based on the processes used to create them. This approach is troubling for environmentalists, given that the production and disposal methods of products are important because environmental damage and pollution will usually occur during these processes, and will often not be caused by the product itself.⁴⁶

Environmentalists argue for Processes and Production Methods (PPMs) to be distinguishing factors since they allow the markets to take account of environmental externalities and to distinguish products that have been made using sustainable methods from those that have been made using unsustainable methods. This argument is based on the assertion that 'by providing regressive measures towards environmentally harmful products the balance will shift in favour of eco-friendly methods'.⁴⁷ Such a position is seen as being integral to sustainable development since it promotes an approach that focuses on sustainable ways to produce products.⁴⁸

1.5 Research question

One of the principles emerging from all the soft law discussed above is that states have the responsibility of enacting environmental legislation and environmental standards that reflect precarious position of the global environment. In

⁴⁴ Jason Potts, 'The legality of PPMS under the GATT: Challenges and Opportunities for Sustainable Trade Policy', International Institute for Sustainable Development (2008), Dominic A Gentile, 'International Trade and the Environment: What is the Role of the WTO?', Fordham Environmental Law Review, Vol. 19 No 1 (2009) and Steve Charnovitz, 'The Law of Environmental PPMs in the WTO: Debunking the Myth of Illegality', The Yale Journal of International Law. Vol. 27 No. 59. (2002) 59-110.

⁴⁵ Ibid note 2.

⁴⁶ 'Trade and Green Economy: A Handbook', The United Nations Environment Programme Division of Technology, Industry and Economics, Economics and Trade Branch and The International Institute for Sustainable Development (2014) 3rd edition at 67.

⁴⁷ Ibid note 44 at 1.

⁴⁸ David Runnalls, 'The WTO in the Trade and Environment Debate' in "Trade, Environment and Sustainable Development: Views from sub-Saharan Africa and Latin America". Ed Peider Konz, The United Nations University (2000) at pg. 61.

a setting where the ‘the major cause of the continued deterioration of the global environment is the unsustainable pattern of consumption and production’,⁴⁹ states have the responsibility of setting standards that regulate the processes and methods used to produce goods so that the damage to the environment is minimised.

This dissertation asks the following questions

- Is the WTO’s policy on PPMs in line with the goal of sustainable development?
- Does the WTO’s policy in relation to non-product-related Process and Production Methods undermine sustainable development and the ability of states to set their own environmental protection agenda?

The dissertation will try to show that while GATT rules are not designed to undermine the objective of environmental protection, their application has reduced the ability of states to set their own agendas in relation to environmental protection. This will be done with reference to the ‘like product’ analysis under Article III:4 of the GATT which governs domestic regulations and the treatment they afford to domestic and imported products. It will be argued that the WTO’s policy in relation to non-product-related PPMs in the ‘like product’ analysis has the potential of undermining the efficacy of ecological protections put in place in pursuit of sustainable development.

The dissertation will begin by providing an overview of sustainable development, Sustainable Consumption and Production Patterns and its role in achieving sustainable development as well the responsibilities it lays on governments. Chapter 3 will move on to introduce Process and Production Methods and the controversies surrounding their integration into international trade law. Chapter 4 will look at what provisions of the GATT agreement are implicated in the PPM debate and how WTO case law has dealt with PPMs in the likeness determination and whether Article XX provides a suitable alternative to the Article III like product analysis. Chapter 5 will then look at whether the approach of the WTO is in line with sustainable development and the ability of states to set their own environmental protection agenda.

⁴⁹ Agenda 21, U.N. Conference on Environment and Development, U.N. Doc. A/Conf. 151/26/Rev.1 paragraph 4.3.

CHAPTER 2- SUSTAINABLE CONSUMPTION AND PRODUCTION PATTERNS

2.1 Introduction

As stated above, the premise of sustainable development is that the current patterns of economic growth, which are largely driven by production and consumption, are not sustainable. Following this line of thinking, one of the key goals of sustainable development is achieving sustainable patterns of consumption and production. During the United Nations Conference on Environment and Development the concept of sustainable consumption and production was identified as a key theme linking environmental and developmental challenges. This was reflected in one of the outcomes of the Conference, Agenda 21, which makes sustainable consumption and production a key part of achieving sustainable development.

This chapter will provide an overview of the goal of sustainable consumption and production patterns and what it entails, especially by way of what responsibilities it places on states.

2.2 Agenda 21 and sustainable patterns of production and consumption

Agenda 21 is a plan of action to be implemented globally, nationally and locally where the environment has been impacted by human action. It provides that the one of the main causes of the sustained deterioration of the global commons is the unsustainable patterns of consumption and production and advocates for more focus to be placed on the ‘demand for natural resources generated by unsustainable consumption and to the efficient use of those resources consistent with the goal of minimizing depletion and reducing pollution’.⁵⁰

Chapter four of Agenda 21 is concerned with changing consumption and production patterns and identifies two broad objectives in doing so. The first is encouraging patterns of consumption and production that reduces environmental pressure and the second is better understanding the role of consumption in

⁵⁰ Agenda 21, U.N. Conference on Environment and Development, U.N. Doc. A/Conf. 151/26/Rev.1 paragraph 4.5.

sustainable development and finding feasible ways to move towards more sustainable production patterns.⁵¹ In identifying these two broad objectives it places the responsibility on governments to encourage ‘efficiency in production processes and decrease wasteful consumption that has become a part of economic growth’.⁵² In promoting this objective, Agenda 21 makes reference to the use of economic instruments such as environmental charges and taxes as a way of influence consumer and producer behaviour⁵³ as well as the fact that ‘without market signals that make clear to producers and consumer the environmental costs of the consumption of energy, materials and natural resources and the generation of wastes’ changes in consumption and production patterns are unlikely to occur in the near future.⁵⁴

The goal of sustainable production and consumption patterns continued to feature in sustainable development discourse after the Rio Summit, which focused on the role international trade plays in promoting the concept of sustainable development. Ten years after the Rio Conference, the Johannesburg Plan of Implementation (JPOI) was signed at the World Summit on Sustainable Development.⁵⁵ Chapter 3 of the JPOI was focused on ‘Changing Unsustainable Patterns of Consumption and Production’. It declared that ‘fundamental changes in the way societies produce and consume are indispensable for achieving global sustainable development’ and that countries should encourage the growth of more sustainable consumption and production patterns.⁵⁶ It also called for the development of a 10-Year Framework of Programmes (10 YFP) to hasten the shift

‘towards sustainable consumption and production to promote social and economic development within the capacity of ecosystems by...de-linking economic growth from environmental degradation *through improving efficiency and sustainability in the use of resources and production processes* and reducing resource degradation, pollution and waste’.⁵⁷

In turn, the Marrakech Process, a process that supports the development of a 10 YFP on sustainable development, responded to this call by supporting the

⁵¹ Ibid at para 4.7.

⁵² Ibid at 4.17.a.

⁵³ Ibid at para 1.25.

⁵⁴ Ibid at para 4.24.

⁵⁵ Johannesburg Declaration on Sustainable Development and Plan of Implementation of the World Summit on Sustainable Development A/CONF.199/L.7.

⁵⁶ Ibid at para 14.

⁵⁷ Ibid at para 15.

implementation of sustainable consumption and production programmes, projects and policies, and contributing to the construction of a 10 YFP. The growth of sustainable consumption and production patterns as part of sustainable development is also seen in the Sustainable Development Goals. The Goals, which build on the Millennium Development Goals, were formulated at the UN Sustainable Development Conference in 2015, and state that one of their aims is to promote sustainable consumption and production patterns and to ‘increase net welfare gains from economic activities by reducing resource use, degradation and pollution’.⁵⁸

It seems as though the development of sustainable consumption and production patterns will continue to play a dominant role in the move towards sustainable development. But what does sustainable consumption and production entail? There have been a number of points of departure identified in what sustainable consumption and production patterns entail. These include ‘the level of emphasis on consumers, lifestyle and consumerism, differentiation between sustainable consumption and sustainable production and differing views about the need to change the aggregate level of consumption’.⁵⁹ But it appears that there is consensus on the fact that it relates to the use of resources and energy (from resource extraction to the processing of those resources) to create goods and services for consumers.⁶⁰ In line with this thinking, sustainable consumption and production has been defined as ‘the use of services and related products, which respond to basic needs and bring a better quality of life, while minimizing the use of natural resources ... as well as the emissions of waste and pollutants over the life cycle of the service or product so as not to jeopardize the needs of further generations.’⁶¹

The call for sustainable consumption and production patterns links economic processes to the environment and natural resources and looks to establish policy instrument and tools that encourage cleaner and more responsible production.⁶² The 2015 United Nations Environment Programme Discussion Paper on ‘Sustainable Consumption and Production Indicators for the Future Sustainable Development

⁵⁸ www.un.org/sustainabledevelopment/sustainable-consumption-production/ accessed February 1 2017.

⁵⁹ Daniel A Farber, ‘Sustainable Consumption, Energy, and Individual Well-being’, *Vanderbilt Law Review*, Vol. 56 No 6 (2012) 1479- 1525 at 1488.

⁶⁰ *Ibid* at 1488.

⁶¹ Oslo symposium 1994.

⁶² ‘Sustainable Consumption and Production Indicators for the future SDGs’ UNEP Discussion Paper, March 2015 at 8.

Goals’,⁶³ outlines how vital the concept of sustainable consumption and production patterns are to the achievement of sustainable development. In doing so it points to the United Nations General Assembly resolution 66/288⁶⁴ which outlined the promotion of sustainable consumption and production patterns as the ‘overarching objectives of and essential requirements for sustainable development’.⁶⁵ The paper states that this shows that achieving sustainable consumption and production patterns is a fundamental instrument in mitigating environmental degradation and resource depletion that is often a result from economic activity and growth.⁶⁶ This is in line with the view that increased resource efficiency contributes to minimizing pressure on the environment.

To this end, one of sustainable consumption and production patterns’ main goals is to separate economic growth and environmental degradation through the efficient use of resources in the production and use of products and by striving to maintain material and pollution intensity of all production functions within the carrying capacity of the environment.⁶⁷ The implementation of the achievement of sustainable consumption and production patterns helps to balance the necessity of producing goods in order to maintain the population with that of using appropriate technologies and the efficient use of renewable and non-renewable resources. It tries to prevent environmental damage from the start of the life-cycle of goods- the production process.⁶⁸

2.3 Governments and sustainable consumption and production

Consumers through their purchases and behaviour can demand more sustainable approaches from companies in terms of both their products and production methods. They can create markets for sustainable products and stimulate enterprises to innovate and develop new technologies to address environmental and

⁶³ Ibid.

⁶⁴ United Nations General Assembly Resolution [A/RES/66/288](#) at para 4

⁶⁵ Ibid note 62 at 8.

⁶⁶ Ibid.

⁶⁷ John C Dernbach, ‘Sustainable Development as a Framework for National Governance’, Case Western Reserve Law Review, Vol 49 No 1 (1998) 1- 103 at 25.

⁶⁸ K.T. Shibin et al, ‘Sustainable Consumption and Production: Need, Challenges and further research directions’, International Journal of Process Management and Benchmarking, Vol. 6 No 4 (2016) 447-468 at 454.

social challenges. But governments can directly invoke sustainable production through regulating and taxing companies.⁶⁹

It has been argued that the beginning of sustainable development is the need for markets to internalise environmental and social costs.⁷⁰ This is the point at which the involvement of governments is important; this is because effective sustainability strategies will look to regulate market failures in terms of consumption (principally through taxes on and subsidies on consumers) and production (mainly through regulating producers and the processes they use).⁷¹

In terms of consumption, governments can intercede in markets to address the failure of consumers to take into account for the environmental and social costs of their consumption. This is typically through taxes and subsidies which either increase or reduce the costs of consumer purchase and behaviours depending on their relative sustainability.⁷² Consumption taxes can discourage the use of polluting products and promote the production of recyclable alternatives. When it comes to production and absorbing negative environmental externalities, a more direct and effective route to ensure sustainable production is to pass regulations, tax or subsidize producers and to make corporate responsibility mandatory instead of voluntary'.⁷³

2.4 Conclusion

The free trade policy has the aim of letting markets decide where resources must be allocated to gain the most efficient use of them. On the other hand, environmental policy has the aim of managing and maintaining natural resources also in the most efficient way possible.⁷⁴ This has resulted in emphasis being placed on the need for sustainable production. The international bodies discussed above recognise that unless and until production methods become sustainable, the ultimate

⁶⁹ Candice Stevens, 'Linking Sustainable Consumption and Production: The Governments Role', Natural Resources Forum (2010) 16-23 at 16.

⁷⁰ Organisation for Economic Co-operation and Development, 'Processes and Production Methods: Conceptual Framework and Consideration on Use of PPM-Based Trade Measures' (1997) OECD/GD (97)137 at www.oecd.org.

⁷¹ Ibid note 69 at 17.

⁷² Ibid.

⁷³ Ibid note 69 at 18.

⁷⁴ Robert Houseman and Durwood Zaelke, 'Trade, Environment and sustainable Development: A primer' Hasting International and Comparative Law Review, Vol. 15 (1992) at 535.

objective of sustainable development cannot be achieved. This conflict has to be reconciled in order to promote the agenda of sustainable development. One of the ways that has been proposed is the adoption of market based strategies like those listed above. This includes the regulation of process and production methods which will be discussed in the next chapter.

CHAPTER 3- PROCESS AND PRODUCTION METHODS

3.1 Introduction

As mentioned above, absorbing negative environmental externalities, through the regulation of products and processes and taxes, has been identified as a way of achieving sustainable development.⁷⁵ As stated in international instruments (for example the Rio Declaration and Agenda 21) the job of governments and legislators in these instances is to design and implement tools which assist the markets to internalise the negative environmental costs of economic activities. States often enact national environmental protection laws in order to regulate products on the basis of their production and process methods. This is because production and process methods are considered the principle sources of environmental damage- not the product itself. One method of doing this is through the regulation of Process and Production Methods (PPMs). However, difficulties arise in international trade law when countries attempt to apply domestic PPM regulations to foreign products. What follows is an introduction on Process and Production Methods.

3.2 Process and Production Methods

Process and Production Methods (PPMs) broadly refer to activities that are undertaken in the process of bringing a good to market.⁷⁶ This includes activities related to the actual production of goods, or to the extraction of natural resources for eventual incorporation into goods, or to trading practices used to bring goods to market.⁷⁷ This thesis focuses on the regulation of PPMs that cause environmental harms. More specifically, it focuses on laws or trade measures that aim to maintain the integrity of affected environments/ ecosystems by regulating the way in which products are processed and the way in which natural resources are harvested.

⁷⁵ Jason Potts, 'The legality of PPMS under the GATT: Challenges and Opportunities for Sustainable Trade Policy', International Institute for Sustainable Development (2008) at 3.

⁷⁶ Ibid at 1.

⁷⁷ Organisation for Economic Co-operation and Development, 'Processes and Production Methods: Conceptual Framework and Consideration on Use of PPM-Based Trade Measures' (1997) OECD/GD (97)137 at 7- 9.

PPM regulations that are directed at environmental harm tend to address the potential production of negative externalities,⁷⁸ they focus on the way in which products are manufactured and processed or the way in which natural resources are extracted or harvested as a way of protecting the environment.

3.3 Product-Related PPMs v Non-Product Related PPMs

A 1997 OECD report classified PPMs into two categories- product-related PPMs and non-product related PPMs.⁷⁹ This classification is based on the point at which the environmental impacts of a certain PPM manifests; either during the consumption stage or the manufacturing stage. Product-related PPMs would be those whose environmental impacts manifest during the consumption stage of the product, while non-product related PPMs would be those whose impacts manifest during the manufacturing stage of the product. For the OECD, this was a way of telling the difference between a PPM requirement that deal with consumption externalities⁸⁰ and those that address production externalities.⁸¹

Legal literature draws a distinction along similar lines.⁸² Product related PPMs are those that affect the characteristics of the product itself or influence the quality of the product. Regulations that relate to product related PPMs are used to guarantee the functionality of the product or to protect the consumer who uses the

⁷⁸ Robert Read, 'Like Products, Health and Environmental Exceptions: The Interpretation of PPMs in Recent WTO Trade Dispute Cases', *Estey Centre Journal of International Law and Trade Policy*, Vol. 5 No 2 (2004) 123-146.

⁷⁹ *Ibid* note 77.

⁸⁰ Consumption externalities are environmental effects or damages which manifests during at the distribution/ marketing stage or when goods are consumed and disposed of after consumption and are not incorporated into the cost of the product. These requirements affect the characteristics of the product and may concern the physical or chemical properties of the product. PPM requirements in this case would be concerned with the physical and chemical characteristics of the product. (Organisation for Economic Co-operation and Development, 'Processes and Production Methods: Conceptual Framework and Consideration on Use of PPM-Based Trade Measures' (1997) OECD/GD (97)137 at 10)

⁸¹ Production externalities refer to those environmental effects which manifest at the time a natural resource is cultivated, extracted and processed. These typically do not affect the products characteristics. PPM requirements seeking to regulate production externalities would aim to limit the environmental damage that results from the processes used to manufacture the product (Organisation for Economic Co-operation and Development, 'Processes and Production Methods: Conceptual Framework and Consideration on Use of PPM-Based Trade Measures' (1997) OECD/GD (97)137 at 10-11).

⁸² Jason Potts, 'The legality of PPMS under the GATT: Challenges and Opportunities for Sustainable Trade Policy', *International Institute for Sustainable Development* (2008) at 3 and Steve Charnovitz, 'The Law of Environmental PPMs in the WTO: Debunking the Myth of Illegality', *The Yale Journal of International Law*. Vol. 27 No. 59. (2002) 59-110.

product.⁸³ These regulations help to ‘assure that customers receive a product at the anticipated quality level. Thus they are related to the product even though adherence to a particular process may not be directly detectable in the product’.⁸⁴ On the other hand, non-product-related PPMs are those that do not have a discernible impact on the product. In this case, the use of a particular process or method does not have a bearing on the final quality of the product. Regulations that govern non-product related PPMs are generally ‘designed to achieve a social purpose that may or may not matter to a consumer’.⁸⁵ In terms of environmental protection, non-product-related PPM requirements generally aim to reduce or control negative or promote positive environmental effects during the production stage- before the product is placed on the market.⁸⁶ As such they can include the prescription or restriction of certain technologies at the time of cultivation and/ or extraction of natural resources or the methods to be used when processing natural resources into goods that may be placed on the market.

Read in line with the OECD report, product-related PPMs affect the quality or character of the product and its environmental effects occur during the consumption stage of the products life-cycle.⁸⁷ On the other hand, non-product related PPMs don’t have any discernible impact on the products and its environmental effects occur during the manufacturing stage of the products life-cycle. Hence the focus on non-product related PPMs when it comes to regulating unsustainable production patterns.⁸⁸

PPM requirements can be designed in a number of ways, e.g. prescribing a PPM, prohibiting one or several PPMs or prescribing emission or performance effects rather than the method themselves. There are different instruments for implementing PPM requirements, such as regulations, labels and environmental

⁸³ Steve Charnovitz, ‘The Law of Environmental PPMs in the WTO: Debunking the Myth of Illegality’, *The Yale Journal of International Law*. Vol. 27 No. 59. (2002) 59-110 at 65.

⁸⁴ *Ibid.*

⁸⁵ *Ibid.*

⁸⁶ Organisation for Economic Co-operation and Development, ‘Processes and Production Methods: Conceptual Framework and Consideration on Use of PPM-Based Trade Measures’ (1997) OECD/GD (97)137.

⁸⁷ *Ibid.*

⁸⁸ *Ibid.*

taxes.⁸⁹ When referring to PPMs from this point, the dissertation will be talking about laws regulating non-product-related-PPMs.

3.4. The Debate Around PPMs

PPMs implemented only within national boundaries remain relatively uncontroversial. The same cannot be said of those that are implemented in the context of globalised or international markets. PPMs have been the subject of much debate and controversy, largely because they have a reputation for distorting trade and restricting market access, even though they have been deemed a vital tool in addressing environmental damage. The arguments for and against the regulation of PPMs in international trade will be briefly discussed below.

The argument against allowing PPMs is largely concerned with its potential impacts on development. Those pushing for PPMs to be excluded from being a part of international trade law argue that placing environmentally based conditions on trade will create additional barriers to trade that will erode the development objectives of trade liberalisation.⁹⁰ These parties perceive environmental conditions through PPM measures as systematic and veiled protectionism devised to protect domestic industries against foreign competition.⁹¹ Government might be driven by economic considerations rather than environmental considerations to ‘conduct an inventory of the environmentally preferable PPMs used by its domestic industries and make new regulations penalising those producers (that is, foreigners) not using them’.⁹² The central argument here is that protectionist elements of PPMs may impose burdens on foreign producers as a way of preventing them from gaining a competitive advantage and can be used to protect domestic producers and workers from import competition.⁹³ This would limit imports produced in a specific manner,

⁸⁹ Ibid note 86 at 7/

⁹⁰ Ibid note 75 at 4.

⁹¹ Ermias Ayalew, ‘Process- based Trade Related Environmental Measures under the GATT/WTO rules and effects in Least Developed Countries’, Jimma University Law Journal, Vol. 4, No 1. Jason Potts, ‘The legality of PPMS under the GATT: Challenges and Opportunities for Sustainable Trade Policy’, International Institute for Sustainable Development (2008) at 4

⁹² ‘Trade and Green Economy: A Handbook’, The United Nations Environment Programme Division of Technology, Industry and Economics, Economics and Trade Branch and The International Institute for Sustainable Development (2014) 3rd edition at 67.

⁹³ Ibid note 83 at 62.

for they would make it difficult and expensive for exporters since they would have to make sure that their PPMs conformed to the regulations of the importing state.

It has been argued that the regulation of non-product related PPMs can be harmful to the economies of the exporting country, that they can create a negative economic effect in the exporting country. This is because regulations of PPMs have the potential to create financial and technological burdens, especially on small producers and developing countries since they would have to adapt their PPMs according to the requirements of importing countries.⁹⁴ In the same vein it has been argued that allowing the use of PPMs might be detrimental to developing countries whose social priorities do not align with those of developed countries. The fear in this regard is that permitting trade measures or trade ‘barriers’ will allow developed, wealthier states to impose their ‘preferred norms on countries with lower incomes and different priorities’ in comparison to developed states.⁹⁵ For example, developing countries may be more concerned with building their domestic industries and infrastructures than with environmental issues; to insist that they adhere to strict environmental PPMs would be harmful to their development because a choice will have to be made between building their infrastructure or limiting potential economic growth by adopting environmental PPMs that force domestic producers to absorb any negative environmental costs from economic activities.⁹⁶ Linked to this is the idea that developed countries have built their wealth without having strict PPMs. Given this, it would be hypocritical to expect developing countries to forgo the step of unregulated growth.

Another concern in the argument against the regulation of PPMs relates to sovereignty, especially in relation to environmental externalities limited to exporting countries. It has been argued that the decision as to the method of production must be left to the discretion of the exporting country where the adverse effects of PPMs is limited to that country alone. This is because it is an expression of state sovereignty under general international law, which includes the authority of a state to decide on

⁹⁴ Ibid note 92 at 67.

⁹⁵ Steve Charnovitz, ‘The Law of Environmental PPMs in the WTO: Debunking the Myth of Illegality’, *The Yale Journal of International Law*. Vol. 27 No. 59. (2002) 59-110 at 63 and Sanford E Gaines, *Process and Production Methods: How to Produce Sound Policy for Environmental PPM-based Trade Measures*, 27 *Columbia Journal of Environmental Law*, 396 (2002) at 427.

⁹⁶ Ibid note 91.

matters exclusively within its territory.⁹⁷ There is worry that PPMs infringe on a state's sovereignty as they are coercive in that they prescribe environmental policies to foreign governments.⁹⁸

On a more practical level, there is opposition to PPMs because they may lead to conflict if a number importing countries impose conflicting policy standards on an exporting country.⁹⁹ There is the resultant fear that it will be next to impossible to manage different regulations and standards.¹⁰⁰

From the perspective of environmentalists, the use of PPMs has been seen as being crucial in addressing environmental damage in the context on international trade because the production and disposal methods of products are at the core of environmental damage- environmental degradation will occur during such processes and not from the product itself.¹⁰¹ Because of this, environmentalists claim that most environmental problems can be traced to environmentally destructive practices and that PPM requirements can help to ensure that the market takes into account environmental externalities by distinguishing between goods that are produced using clean and sustainable methods from goods that are produced using unsustainable methods.¹⁰²

Environmentalists also argue that in the absence of regulatory regimes that ensure imported products are subject to high environmental standards, the effort to apply high environmental standard to domestic products will be hindered.¹⁰³ In a situation where only domestic products are subjected to higher standards they may not be able to equally compete with foreign producers that may offer their products with relatively cheaper prices.¹⁰⁴ It is safe to assume that no country wants to make its producers less competitive by imposing higher environmental standards without ensuring that producers in exporting countries are subject to comparable standards.

⁹⁷ Ibid.

⁹⁸ Ibid note 83 at 69.

⁹⁹ Ibid.

¹⁰⁰ Who's Afraid of PPMs? Discussion paper prepared by Chris Fisher, Consultant to the Eurogroup for Animal Welfare. Presented at the EC ad hoc NGO consultation meeting on PPMs, Brussels, 31/05/01 at 1.

¹⁰¹ Ibid note 92 at 67.

¹⁰² Ibid.

¹⁰³ Ibid note 91.

¹⁰⁴ Ibid.

Lobbyists of environmental protection argue that efforts to protect the environment cannot be realised without successfully regulating PPMs.¹⁰⁵

Disallowing the regulation of PPMs would also take away a significant potential weapon for environmental protection. If states fail to act to protect their own environment, without permitting PPMs other countries will have limited trade leverage to encourage better environmental practices, and it would be impractical and insufficient to wait for producing countries to take the necessary steps to protect the environment.¹⁰⁶

The call for allowing non-product-related PPM requirements is also based on the argument that they are effectively a result of dysfunction in international environmental governance. For a lot of environmentalist scholars, the lack of stewardship of the global commons and the ‘lack of liability for transboundary environmental harms’ are the reason that states at different stages of development turn to PPM requirements as a way of ensuring environmental protection.¹⁰⁷ Addressing the lack of responsible management of global resources would preclude the need for many PPM requirement’s and would simultaneously improve the prospects for economic growth and environmental protection.¹⁰⁸ However, since this tool is not currently effective, it falls on states to protect the environment through the adoption of PPMs.

3.5 Conclusion

This chapter has sought to explain what PPMs, the controversy surrounding them and why states seek to use them as a way of addressing environmental harms.

There has been criticism that some countries are choosing unilateral national action over available multilateral action but the fact is that effective, broad-membership treaties are difficult to achieve.¹⁰⁹ And when the best option of multilateral

¹⁰⁵ Ibid.

¹⁰⁶ Jonathan M. Harris, ‘Trade and the Environment’ <http://ase.tufts.edu/gdae> accessed 9 February 2017.

¹⁰⁷ Ibid note 83 at 70.

¹⁰⁸ Ibid.

¹⁰⁹ Ibid note 83 at 71.

cooperation is unavailable or ineffective, governments may consider using PPM requirements in order to combat environmental harms indirectly.

It has also been shown that there are valid concerns on both the side of environmentalists and the side of proponents of trade liberalisation. The important question at this point is whether and how these conflicting concerns have been balanced. This dissertation will now discuss the provisions of GATT that are implicated in the use of PPMs to differentiate between products. It will also provide a brief summary of the findings of the WTO Dispute Settlement Body in this matter.

CHAPTER 4- GATT OBLIGATIONS, EXCEPTIONS AND CASE LAW

4.1 Introduction

The principal mandate of the World Trade Organisation (WTO) is to facilitate the move towards a more open, non-discriminatory and equitable international trading system.¹¹⁰ The preamble of the General Agreement on Trade and Tariffs, which sets out the obligations of WTO members, states that in pursuing this multilateral trading system, states will ‘enter into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barrier to trade and to the elimination of discriminatory treatment in international commerce...’.¹¹¹ To this end, the fundamental cornerstone of the WTO system is the principle of non-discrimination. This cornerstone is composed of the Most-Favoured Nation Principle and the National Treatment Principle, as laid out in Articles I and III of the GATT respectively.¹¹² These are also the provisions of the GATT that inform the PPM debate, the central concept under both being ‘like product’. This is because in an effort to address environmental damages, PPM requirements may differentiate between products that are physically identical but differ in the processes used to bring them to market.¹¹³ Measures such as these would be in violation of Article III only if sustainably and unsustainably products are considered ‘like products’

This chapter provides an overview of the relationship between the key substantive obligations and their exceptions in GATT, as well as a summary of GATT/WTO jurisprudence with a focus on the ‘likeness’ determination under Article III.

¹¹⁰ Dominic A Gentile, ‘International Trade and the Environment: What is the Role of the WTO?’, *Fordham Environmental Law Review*, Vol. 19 No 1 (2009) 195- 230.

¹¹¹ Marrakesh Agreement Establishing the World Trade Organization, 1867 U.N.T.S. 154, 33 I.L.M. 1144 (1994).

¹¹² Ryan L. Winter, ‘Reconciling the GATT and WTO with Multilateral Environmental Agreements: Can We Have Our Cake and Eat It Too?’, *Colorado Journal of International Environmental Law and Policy*, Vol. 11.

¹¹³ Rudi Kruse, ‘Process and Production Methods and Burden of Proof: A Procedural Limitation of the ‘Like’ Products Debate’, *International Trade and Business Law Review*, Vol. 16 (2013) 377-393 at 380.

4.2 The GATT Provisions Which May arise in the Context of PPMs

The Most-Favoured-Nation principle is enshrined in Article I of GATT. It prohibits discrimination between ‘like products’ based on the country of origin. Article I provides that,

‘with respect to customs duties and charges of any kind imposed on or in connection with importation or exportation...and with respect to all rules and formalities in connection with importation and exportation...any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties’.

An advantage under Article I is any measure that makes it easier for an exporter to enter the market of an importer. In the *EC-Banana III* case, the panel found that advantages are those that create favourable import opportunities or affect the competitive relationship between products of different origin.¹¹⁴ The MFN is essentially concerned with ‘promoting equality of competitive opportunities’ among exporters.¹¹⁵

The National Treatment Principle is enshrined in Article III of the GATT and it prohibits discrimination between like products between imports and domestic measures. Article III provides that products of a member states, imported into the territory of another member state shall not be subjected to taxes or charges in excess of those applied to ‘*like domestic products*’, and that imports of a member states imported into the territory of another member state ‘shall be accorded treatment no less favourable than that accorded to *like products* of national origin in respect of all laws, regulation and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use’.

Article III is concerned with different treatment between domestic and imported products and with providing equality of competitive conditions and opportunities in relation to domestic and imported products.¹¹⁶ The purpose of the

¹¹⁴ *European Communities- Regime for the Importation, Sale and Distribution of Bananas* WT/DS27/AB/R (1997).

¹¹⁵ *Japan- Taxes on Alcoholic Beverages* WT/DS11/AB/R (1996) at 15.

¹¹⁶ *Ibid* note 115.

national treatment rule is to ensure that products from abroad have the same opportunity to compete in domestic markets, and that domestic taxes, laws, regulations and policies do not negatively impact the competitive opportunities of imported products. Article III creates an obligation on its members to treat imported products no less favourably than *like domestic products*. This means that members may treat imported products less favourably than domestic products if the two are not like.

It is important to note that the application of both the articles is qualified by the requirement that the non-discrimination principle only applies where ‘like products’ are involved.¹¹⁷ PPM requirements bring up the issue of likeness because in an effort to address environmental damages, domestic environmental measures may draw a difference between products which on the face of it may seem to be identical, but differ in the environmental effects of the processes/ methods used to manufacture them. Measures such as these would be in violation of Article III only if sustainable and unsustainable products are considered ‘like products’.

The concept of ‘like product’ has been subject to a great deal of debate which centres around the question of how likeness may be determined, this will be discussed below.

4.3 Likeness

Determining whether two products are ‘like’ is crucial in deciding whether a member has violated the obligation of non-discrimination. The GATT does not provide a definition of the meaning of what ‘like products’ are. The criteria for determining what constitutes a ‘like product’ have developed as a result of the development of GATT/ WTO case law but were first laid out in the Border Tax Adjustment Report.¹¹⁸ In this report, the working panel noted that previous discussions in the GATT had not been successful in providing a solid interpretation of the term ‘like products’. It concluded that determining whether products are ‘like’ should be done on a case by case basis, holding that ‘this would allow for a fair

¹¹⁷ Shawkat Alam, ‘Trade- Environment Nexus in GATT Jurisprudence: Pressing Issues for Developing Countries’, *Bond Law Review*, Vol. 17, Issue 2 (2005) 9-11.

¹¹⁸ Border Tax Adjustment Report, L/3464 (1970).

assessment in each case of the different element that constitute a “similar product””.¹¹⁹

The working party did suggest criteria that could be used for determining likeness, these were: the products end uses in its given market; consumer tastes and habits’ and the physical properties, nature and quality of the product.¹²⁰ In Japan Alcoholic Beverages, the fourth criteria of tariff classification was added into the “likeness determination.”¹²¹ These four criteria are to be applied to the products in issue in order to determine whether the two products are like, allowing for the panel to proceed to an assessment of non-discrimination requirements.

The point of discussion when it comes to likeness and PPMs is that it seems to be accepted that the dispute settlement body of the WTO has held that the term ‘like product’ only relates to the inherent nature of the product itself.¹²² The result is that products may not be distinguished on the ground of the process or methods used to make the product if their physical characteristics are the same.¹²³ Thus in the determination of whether two products are like or not the focus should only be placed on the criteria listed above and not on additional factors extraneous to the physical characteristics of the product. Any negative externalities that are the result of a production process or method are not to be considered.¹²⁴ This would mean that non-product-related PPMs would be excluded from being a determining factor in deciding whether products are like or not.

The question of ‘like’ products is key to the interaction between international trade law and national environmental measures. Environmental measures may draw a difference between products that are- on the face of it- similar, but that in some aspect, for example production process, have different environmental. In this case, if the concept of ‘likeness’ is interpreted so that it considers environmentally harmful products as being ‘unlike’ to products that have been produced in an environmentally sustainable manner, then the WTO obligation of non-discrimination would provide

¹¹⁹ Ibid at para 18.

¹²⁰ Ibid note 118 at para 18.

¹²¹ Ibid note 115.

¹²² United States- Restriction on Imports of Tuna DS21/R-39S155.

¹²³ Ibid.

¹²⁴ Ermias Ayalew, ‘Process- based Trade Related Environmental Measures under the GATT/WTO rules and effects in Least Developed Countries’, Jimma University Law Journal, Vol. 4, No 1.

increased flexibility to member states enacting environmental measures.¹²⁵ On the other hand, if environmental considerations are not taken into account when determining whether two products are ‘like’, then the WTO’s non-discrimination provisions could constrain attempts by member states to enact environmental or health protection measures.¹²⁶

This thesis now moves on to consider WTO cases and jurisprudence relating to ‘like products’ and the extent to which the requirement to accord non-discriminatory treatment to like products prohibits differentiation based on environmental standards observed during the production or processing of the product in question.

4.4 WTO Dispute Settlement Body

One of the results of the Uruguay round of negotiations was the establishment of a new rules based (rather than mediation based) dispute settlement system. This was enshrined by the Dispute Settlement Understanding. In this system, the adoption of a report by a panel may only be blocked if there is consensus from the Dispute Settlement Body to do so, in addition to this an Appellate Body was established in order to review panel findings.¹²⁷

Following the Tuna/Dolphins panel reports,¹²⁸ (as decided under the GATT 1947) most discussions on the international trade and environment debate begin with the assumption that non-product-related PPM have been banned by the WTO.¹²⁹ The assumption that the WTO dispute settlement system excludes the ways a product has

¹²⁵ Nathalie Bernasconi-Osterwalder et al, *Environment and Trade: A Guide to WTO Jurisprudence*, 2006 at 8-9.

¹²⁶ Ibid.

¹²⁷ Article 16(4) of the Dispute Settlement Understanding provides that ‘within 60 days after the date of circulation of a panel report to the members, the report shall be adopted...unless a party to the dispute formally notifies the DSB of its decision to appeal or the DSB decides by consensus not to adopt the report’.

¹²⁸ *United States- Restriction on Imports of Tuna*, 30 ILM (1991) 1594; *United States- Restrictions on Imports of Tuna*, 33 ILM (1994) 936.

¹²⁹ Steve Charnovitz, ‘The Law of Environmental PPMs in the WTO: Debunking the Myth of Illegality’, *The Yale Journal of International Law*. Vol. 27 No. 59. (2002) 59-110.

been produced from consideration in whether products are like.¹³⁰ The purpose of the discussion that follows is to establish whether this is so.

4.4.1 GATT AND WTO CASE LAW

UNITED STATES- RESTRICTIONS OF IMPORTS OF TUNA, 1991¹³¹

The Tuna/Dolphin case has been seen as being characteristic of the trade regulation/environment debate. This is because it was the first case to consider the validity of import restrictions imposed on environmentally damaging PPMs in the WTO context. The case dealt with a ban enforced under the Marine Mammal Protection Act of 1972 which prohibited tuna and tuna products from being imported into the United States if the tuna had been harvested using purse-seine nets in the Eastern Tropical Pacific Ocean.¹³² The United States justified the ban by claiming it was necessary to protect dolphins that were inadvertently caught by the nets when catching tuna. When accused of violating GATT it defended the measure by arguing that it amounted to internal regulations under Article III and was applied equally to domestic fishermen and vessels as well, meaning that it was permitted under Article III as an internal measure, and that Article XI did not apply.¹³³

In addressing the defence of the United States, the panel noted that contracting parties were allowed to impose internal regulations on products imported from other contracting parties provided that these regulations were not applied so as to afford protection to domestic production and that they accorded imported products treatment that was no less favourable than that accorded to like products of national origin as set out by Article III.4.¹³⁴ However, the panel found that the measure did not fall under Article III because the Article ‘covers only those measures that are

¹³⁰ D.J.F. Eaton J. Bourgeois, ‘Product differentiation under the WTO: An analysis of labelling and tariff or tax measures concerning farm animal welfare’, June 2005 Report, Agricultural Economics Research Institute, The Hague.

¹³¹ United States- restrictions of Imports of Tuna DS21/R-39S155.

¹³² Marine Mammal Protection Act Pub. L. No. 92-522, 86 Stat. 1027 (1972).

¹³³ Article XI of the GATT prohibits states from using quantitative restrictions (e.g. quotas or bans on imported products). It disallows ‘prohibition or restrictions other than duties, taxes or other charges’ on products from member countries. Based on the above, Article XI does not deal with restrictions placed on products after entry into the importing country. This is dealt with under Article III as they amount to internal measures. However, the scope of these Article may overlap.

¹³⁴ Ibid note 131 at para 5.9.

applied to the *product as such*'.¹³⁵ The panel reached this conclusion by referring to the repetitive use of the word 'product' in Article III and the call in Article III for a comparison between imported products and domestic products. The Panel drew a distinction between the actual product, and the process used to harvest the product.¹³⁶ It held that because the regulation only governed the taking of tuna (the process) it could not affect tuna as a product and thus could not fall under Article III.

This was criticised by environmentalists because in this case the process used to attain the product was as important as the product itself.¹³⁷ The measure had the aim of protection dolphins but by effectively drawing a distinction between regulations affecting the product and regulations affecting processes relating to the product, the panel took away the country's ability to ban products on the basis that they were produced using environmentally unsustainable practices, in doing so it removed regulations affecting processes and production methods outside the purview of Article III:4.

While the Tuna-Dolphin case was not adopted by the parties to the GATT, it has shaped the attitudes of people towards the GATT, painting it as an enemy of the environment.

US- MEASURES AFFECTING ALCOHOLIC AND MALT BEVERAGES, 1992¹³⁸

In this case Canada complained that various tax measures relating to the production, wholesale, distribution and retail of beer and wine in the United States violated Article III. The measures were varied and used various criteria to distinguish between products and producers (of the alcohol) and as such the panel had to deal with a number of scenarios in which they had to determine if the products at hand were 'like products'.

In a 'like product' analysis looking at whether regulations could provide more favourable treatment to a domestic beverages than an imported beverages, the Panel

¹³⁵ United States- Restriction on Imports of Tuna, 30 ILM (1991) 1594 at para 5.14.

¹³⁶ Ibid at para 5.14- 5.15.

¹³⁷ Robert Howse and Donald Regan, 'The Product/Process Distinction- An Illusory Basis for Disciplining "Unilateralism" in Trade Policy', European Journal of International Law Vol. 11 No 2 (2000) 249-289 at 251.

¹³⁸ United States- Measures Affecting Alcoholic and Malt Beverages, DS23/R-39S/206.

looked at past decisions and noted that decisions on this question have been made on a case-by-case basis which involved examining all relevant criteria, such as the product's end-uses in a given market, consumers tastes and habits, and the product's properties, nature and quality.¹³⁹ The panel was also of the view that when interpreting the phrase 'like product', the purpose of the whole of Article III must be taken into account. It held that the purpose of Article III is to ensure 'that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, purchase, transportation, distribution or use of products...should not be applied to imported or domestic products so as to afford protection to domestic production'.¹⁴⁰ That is, it is to prevent governments from protecting domestic production.

Based on this it was its opinion that governments can enact laws differentiating between 'like products' if the distinction between the two products was a result of a valid public policy reason and not 'to afford protection to domestic production'.¹⁴¹ Since no policy reason was advanced to justify the differentiation of the products and that state and federal tax laws did not make such a distinction, the panel held that the products were like and the distinction was designed to afford protection to domestic production. As such, Article III was violated.

The Malt Beverages case is notable since it introduced the idea of looking at the 'aim and effect' of the measure in question, in order to justify the differentiation between seemingly like products. This test is of relevance to this thesis because it provides an alternative way to differentiate between products that are alike in every way except the way in which they are processed. It is also an attractive option for environmentalists since it allows the Dispute Settlement Body to contextualise the regulation as part of the 'like product' analyses and in doing so exclude the possibility of protectionism in favour of addressing environmental concerns. All they would need to show is that there is a valid public policy reason for the measure and it is not to afford protection to domestic production.

¹³⁹ Ibid at para 5.24.

¹⁴⁰ Ibid note 138 at para 5.25.

¹⁴¹ Ibid.

UNITED STATES-RESTRICTIONS ON IMPORTS OF TUNA¹⁴²

This case emerged from the same set of facts as the first Tuna/ Dolphin case and was decided similarly. In this case the European Economic Community (EEC) took issue with the intermediary nation embargo under the MMPA. The Intermediary nation embargo in S101 (a) (2) (c) of the Marine Mammal Protection Act provided that the Secretary of Commerce ‘shall require the Government of any intermediary nation from which yellowfin tuna or tuna products will be exported to the US to certify and provide reasonable proof that it has acted to prohibit the importation of such tuna and tuna products from any nation from which direct export to the US of such tuna and tuna products is banned’. The EEC argued that the import prohibition amounted to a quantitative restriction and was thus contrary to Article XI of the GATT.¹⁴³ They also argued that the embargo could not be seen as the enforcement at the time or point of importation of an internal law, regulation or requirements which applied to like imported and domestic products within the meaning of Article III.¹⁴⁴

The panel in this case also held that Article III did not apply to laws ‘related to policies or practices that could not affect *the product as such*’.¹⁴⁵ Like its predecessor, the Panel noted Article III’s constant reference to *products* and the need to have a comparison between the treatment accorded to domestic products and the treatment accorded to like imported products. The Panel held that Article III did not apply since the United States trade embargo distinguished between tuna products according to the harvesting practices used. The Panel repeatedly underscored the fact that differences in harvesting techniques do not affect products as products, and that therefore any measures targeting against certain production and processing methods lies outside the scope of Article III.¹⁴⁶

It was once again implicit that there is a distinction between products as such and the process used in producing the products.

¹⁴² United States-Restrictions on Imports of Tuna, DS21/R, 30I.L.M. 1594.

¹⁴³ Ibid at para 3.3.

¹⁴⁴ Ibid at para 3.4.

¹⁴⁵ Ibid at para 5.8.

¹⁴⁶ Ibid at para 5.15; Ermias Ayalew, ‘Process- based Trade Related Environmental Measures under the GATT/WTO rules and effects in Least Developed Countries’, Jimma University Law Journal, Vol. 4, No 1.

Like its predecessor this Panel decision was also not adopted. However, it differs in that the Panel noted that ‘the objective of sustainable development, which includes the protection and preservation of the environment, has been widely recognised by the contracting parties to the General Agreement’.¹⁴⁷ The Panel observed that

‘the issue in this dispute was not the validity of the environmental objective of the United State to protect and conserve dolphins. The issue was whether, in the pursuit of its environmental objectives, the United States could impose trade embargoes to secure changes in the policies which other contracting parties pursued within their own jurisdiction’.¹⁴⁸

This seemed to indicate that the panel recognised that the trading system could promote free trade while recognising that states can and must protect the environment as part of sustainable development.

UNITED STATES- TAXES ON AUTOMOBILES, 1994¹⁴⁹

In this case, the EU lodged a complaint that the US Corporate Average Fuel Economy regulation violated Article III.4 because it involved an averaging method that treated domestic and foreign automobiles separately. The EU argued likeness of products should be based on the traditional criteria laid out in the Border Tax Adjustment.¹⁵⁰ The United States on the other hand argued that the main criterion in determining likeness would be to ask whether the measure in question was applied ‘so as to afford protection to domestic production’.¹⁵¹

The panel in this case adopted the approach of the panel in the Malt Beverages case and decided that the determination of likeness under Article III.2 had to include an investigation of the aim and effect of the measure in issue.¹⁵² Meaning that products may be differentiated on public policy grounds. It expanded the test by stating that when questioning whether the regulations effects afforded protection to domestic production, the proper inquiry would be look at whether the effect were

¹⁴⁷ Ibid note 142 at para 5.42.

¹⁴⁸ Ibid.

¹⁴⁹ United States- Taxes on Automobiles DS31/R.

¹⁵⁰ Ibid at para 5.5.

¹⁵¹ Ibid.

¹⁵² Ibid note 149 para 5.10- 11.

changes in the ‘conditions of competition’, and not just if they changed the volume or flow of imports.¹⁵³

The case seems to accept that product may be considered not ‘like’ if they are produced differently, even if their product characteristics are the same. In the context of PPMs, the panel’s ruling can be taken to mean that a country’s process based trade measures may not be necessarily inconsistent with Article III, even if it results in different treatment of domestic and identical imported products. The reason for this construction lies in the fact that two products may be considered as not like based on the difference in their PPMs, provided that the measure is not taken so as to afford protection to domestic products.

UNITED STATES- STANDARDS FOR REFORMULATED AND CONVENTIONAL GASOLINE, 1996¹⁵⁴

The action in this case was initiated in response to regulations enacted by the United States according to the Clean Air Act of 1994.¹⁵⁵ The measure required a reduction in emissions of gasoline from a pollution baseline. It was argued that the measure was discriminatory because it assigned foreign producers a standard baseline from which they had to reduce their gasoline emissions, while giving domestic refiners an individual baseline.

In determining whether imported and domestic gasoline were like products, the panel took note of the Border Tax Adjustment criteria as well as of the Japan-Alcoholic Beverages case. The panel noted that the imported and domestic gasoline had the exact same physical characteristics, end-uses, tariff classification and were substitutable and so concluded that they were like products under Article III.4.¹⁵⁶ More importantly the panel pointed out that the determination of likeness under Article III.4 should be done ‘on the objective basis of likeness as products...not based on extraneous factors’ such as the characteristics of the producers or manufacturers¹⁵⁷. The panel expanded the likeness analysis by holding that Article

¹⁵³ Ibid note 149 at para 5.10.

¹⁵⁴ United States- Standards for Reformulated and Conventional Gasoline, WT/DS2/AB/R.

¹⁵⁵ Clean Air Act, 42 U.S.C sec 7545 (k) 1994.

¹⁵⁶ Ibid not 154 para 6.7- 9.

¹⁵⁷ Ibid note 154 at para 6.12.

III.4 does not allow less favourable treatment dependent on the characteristics of the producer.¹⁵⁸ This was because ‘the treatment of the imported and domestic goods concerned should be assured on the objective basis of their likeness as products and should not be exposed to highly subjective and variable treatment according to extraneous factors’.¹⁵⁹

If applied in the context of PPMs, this decision would mean that difference in the method of production may not be considered as factors to determine whether two products are ‘like’ since production methods may be deemed as ‘extraneous’. The panel ruling limited the possibility that the determination of likeness may go beyond physical characteristics of products, except when considering the already established criteria of consumer preference and tariff classifications.¹⁶⁰

EUROPEAN COMMUNITIES- MEASURES AFFECTING ASBESTOS AND PRODUCTS CONTAINING ASBESTOS¹⁶¹

This case was not a PPM decision since the ban in question was based on the dangers of the product, but it included an examination of the term ‘like products’ in the context of Article III:4. But if the decision of the panel had been upheld it could have had negative implication for PPMs.

In this case Canada argued that a French ban on asbestos and asbestos containing products was a violation of Article III:4. The panel once again had to determine whether the domestic and imported products under the ban were ‘like products’. The panel used the criteria set out in the Border Tax Adjustment report and held that the risk to human health/ life posed by the product could not be a factor in determining whether the products in issue were like. The European Communities appealed the decision of the panel, arguing that the panel had erred in failing to consider the health risks of the product in its ‘like products’ analysis.

¹⁵⁸ Ibid note 154 para 6.11- 6.13

¹⁵⁹ Tanyarat Mungkalarungso, ‘The Trade and environment Debate’, Tulane Journal of International and Comparative Law, Vol. 10 (2002) 361- 385.

¹⁶⁰ Ermias Ayalew, ‘Process- based Trade Related Environmental Measures under the GATT/WTO rules and effects in Least Developed Countries’, Jimma University Law Journal, Vol. 4, No 1.

¹⁶¹ European Communities- Measures Affecting Asbestos and Products Containing Asbestos WT/DS135/AB/R (2001).

In discussing Article III:4, the Appellate Body referred to the analogy of the Japan- Alcoholic Beverages panel about ‘likeness’ being an accordion that stretches in different ways depending on the provision at issue, indicating that there needs to be some flexibility when determining whether products are like.¹⁶² It went on to note that ‘like product’ determinations should be guided by the principle laid out in Article III:1 which aims to prevent members from enforcing regulation so as to afford protection to domestic production.¹⁶³ This seems to leave open the door for the possibility that process-based trade measures could be consistent with Article III:4 since they would have to be assessed in a purposive manner with the objectives of Article III- the prevention of protective discrimination against imports- in mind.¹⁶⁴

One of the key points of the case was that the Appellate Body made it clear that panels must look at all evidence relevant to a likeness determination. This was because it held that the Panel had made a mistake in its ‘like products’ analysis by failing to examine and consider all the evidence under all of the Border Tax Adjustment criteria. The Appellate Body stated that panels must look at each criterion separately and then weigh them against all the relevant evidence before concluding whether products are like or not.¹⁶⁵ ‘Therefore, even if the evidence related to one of the Border Tax criteria is extremely persuasive a panel may not end its ‘like products’ analysis after examining only that one specific factor. Rather it must also proceed to look at all of the evidence related to the other three criteria’.¹⁶⁶ In addition to this, it stated that the Border Tax criteria were not the only factors a panel could examine and that panels should look at any other relevant evidence to assessing the likeness of products.

The Appellate Body in this case did not close off the possibility that products may be differentiated based on the regulation of the processes used to make them. First of all, the Appellate Body refers to the need for ‘likeness’ to be like an accordion that stretches depending on the provision at issue.¹⁶⁷ This seems to indicate

¹⁶² Ibid at para 96.

¹⁶³ Ibid.

¹⁶⁴ Robert Howse, ‘The Appellate Body Rulings in the Shrimp/Turtle Case: A New Legal Baseline for the Trade and Environment Debate’, Columbia Journal of Environmental Law, Vol. 27, No 5 (2002) 489- 519 at 513.

¹⁶⁵ Ibid note 161 para 101- 103.

¹⁶⁶ Nathalie Bernasconi-Osterwalder et al, Environment and Trade: A Guide to WTO Jurisprudence, 2006 at 8-9.

¹⁶⁷ *Japan- Taxes on Alcoholic Beverages* WT/DS11/AB/R (1996) at 114.

that the likeness of products may depend on the context. This could provide a way in which the question of likeness may be set in the context of environmental damage and efforts to limit it. Secondly it adopts a stance similar to that in the Malt Beverage and Taxes on Automobiles cases by stating that the likeness determination should be guided by the objective of Article III which is to prevent members from enforcing regulation that afford protection to domestic production. If the focus is on this, it leaves space open for an ‘aims and effect’ type test that would provide for a more purposive approach to be taken in the ‘like product’ analysis. This seems to leave open the door for the possibility that process-based trade measures could be consistent with Article III:4 since they would have to be assessed in a purposive manner in light of the objectives of Article III- preventing protective discrimination against imports.¹⁶⁸ The case also provided that the Border Tax criteria are not the only criteria a panel can consider, and that other evidence should be considered, this leaves open an opportunity for DSB to consider a more contextual approach- looking at the aim of the measure in question etc. This leaves the potential for production processes to be brought in as factors to consider when determining likeness.

4.4.2 GATT EXCEPTIONS

When discussing the interpretation of the concept of ‘like products’ and its implication on whether products may be differentiated on the basis of process and production methods, it is necessary to deal with Article XX of the GATT, which is concerned with general exceptions to the obligations of WTO member states. The provision is a way in which the WTO/GATT tries to balance its objective of trade liberalisation with actions of states that relate to issues of public policy. Article XX provides ten types of measures under which member states may deviate from their general obligations. Article XX (b) and (g) have been interpreted as the parts of Article XX that encompass environmental measures. The exceptions laid out in Article XX are subject to its chapeau which requires that measures must not be given effect to in ways which would ‘constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised

¹⁶⁸ Robert Howse, ‘The Appellate Body Rulings in the Shrimp/Turtle Case: A New Legal Baseline for the Trade and Environment Debate’, *Columbia Journal of Environmental Law*, Vol. 27, No 5 (2002) 489- 519 at 513.

restriction on international trade'. Article XX (b) relates to measures 'necessary to protect human, animal or plant life or health' while subsection (g) is concerned with measures 'relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption'.

Article XX essentially provides that there may be instances in which discrimination is justifiable under the GATT. If this is so, why is the debate around trade measures centred on PPMs continuing, why can't the regulation of non-product related PPMs simply be justified under Article XX? Would it not be more appropriate to deal with PPM-based trade measures under Article XX rather than Article III? Article XX does offer some defence for pro-environmental national policies but many environmentalists regard its scope, as laid out in panel decisions, to be disproportionately narrow, 'preserving only very limited and circumscribed national sovereignty with respect to environmental initiatives'.¹⁶⁹

When invoking Article XX (b), the party enforcing the environmental based trade measure must satisfy the 'necessity test'. The measure adopted must be 'necessary to protect human, animal or plant life or health'. In the *Thailand-Cigarettes* case, the panel established that the measure adopted has to be the 'least trade restrictive' measure available.¹⁷⁰ That the measure in question would be exempted only if there were no alternative measures that were consistent with the GATT or one that was less consistent with the GATT. This line of thinking was also adopted by the first Tuna-Dolphin case, which stated that the primary step in satisfying/ invoking Article XX was that the party must have 'exhausted all option reasonably available to it'.¹⁷¹ This approach has been criticised for being overly strict in legal and policy aspects.¹⁷² It has been argued that the necessity test could constitute an 'excessive infringement on the economic sovereignty of a member country that wants to make decisions through the democratic process'.¹⁷³

¹⁶⁹ Chad P. Bown and Rachel McCulloch, 'Environmental Issues in the World Trade Organization' Forthcoming in *The Kluwer Companion to the World Trade Organization*, A. Appleton, P. Macrory and M. Plummer, eds. Dordrecht: Kluwer (2003) at 2.

¹⁷⁰ Thailand- Restrictions on Importation of and Internal Taxes on Cigarettes, DS10/R (1990).

¹⁷¹ United States- Restrictions on Imports of Tuna DS21/R-39S155 at para 5.33.

¹⁷² *Dukgeun Ahn*, 'Environmental Disputes in the GATT/WTO: Before and After *US-shrimp* case', Michigan Journal of International law, Vol. 20, (1998) 819- 870 at 828.

¹⁷³ *Ibid.*

The necessity requirement has evolved in subsequent cases.¹⁷⁴ There has been a move away from focussing on having the ‘least trade restrictive’ measure possible to focusing on a proportionality test that weighs the interests in issue. The appellate in *EC-Asbestos* referred to its findings in the *Korea-Beef* case that when establishing whether a measure is necessary, it needs to balance a

‘series of factors which prominently include the contribution made by the measure to the enforcement of the law or regulation at issue, the importance of the common interests, or values protected by that law or regulation, and the accompanying impact of the law or regulation on imports or exports’.¹⁷⁵

In the *EC-Asbestos* case, the Appellate Body noted that ‘the more vital or important the common interests or values’ that are pursued, the easier it would be to accept as ‘necessary’ measures designed to achieve those ends.¹⁷⁶

When invoking Article XX (g) the key phrases involved are ‘relating to’ and ‘in conjunction’. Panels and Appellate Bodies have held that ‘relating to’ means that the measure must be primarily aimed at rendering effective the restriction it holds.¹⁷⁷ In relation to this, the Appellate Body in the *Shrimp Turtle* case, stated that there must be an observable real and close relationship between the means (the measure adopted) and the end (legitimate policies on environmental protection).¹⁷⁸ In terms of defining what ‘in conjunction’ meant, the requirement established by the Appellate Body was one of even-handedness when imposing restrictions on foreign and domestic products.

If the measures in question satisfy the requirements under Article XX (b) or (g) they must still pass muster under the chapeau. The chapeau of Article XX states that measures may be excepted if they are not applied in a manner that constitutes ‘a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail’ and should not amount to a disguised restriction on trade. In the

¹⁷⁴ Republic of Korea- Restrictions on Imports of Beef L/6503 1989 at para 164.

¹⁷⁵ European Communities- Measures Affecting Asbestos and Products Containing Asbestos WT/DS135/AB/R (2001) at 52.

¹⁷⁶ Ibid.

¹⁷⁷ United States- Restrictions on Imports of Tuna DS21/R-39S155, United States- Restrictions on Imports of Tuna, 33 ILM (1994) 936, United States- Taxes on Automobiles, DS31/R and United States- Standards for Reformulated and Conventional Gasoline, WT/DS2/AB/R.

¹⁷⁸ United States- Import Prohibition of Certain Shrimp and Shrimp Products WT/DS58/AB/RW (2001) at para 141.

Shrimp-Turtle case the Appellate Body established that applying the chapeau of Article XX is

‘one of locating and marking out a line of equilibrium between the right of a Member to invoke an exception under Article XX and the rights of other Members under varying substantive provisions of the GATT 1994 so that neither of the competing rights will cancel out the other and thereby distort and nullify or impair the balance of rights and obligations constructed by the Members themselves in that Agreement. The location of the line of the equilibrium, as expressed in the chapeau, is not fixed and unchanging: the line moves as the kind and the shape of measures at stake vary and as the facts making up specific cases differ’.¹⁷⁹

So what does this mean for PPMs in GATT law? Article XX serves the purpose of providing a public policy ground on which WTO members may deviate from the obligations set out in GATT, and if PPMs fit within the exceptions set out in Article XX (b) and (g) and satisfy the requirements of the chapeau they are determined to be GATT compliant. Case law has also seen the application of Article XX become less strict in its interpretation of Article XX (b) and (g). It has moved away from looking to establish that the measure in question is the most GATT consistent (which prioritises trade interest over other considerations) to looking at balancing all relevant factors in the case (in this case legitimate environmental policies (PPMs) and concerns of trade protectionism) in order to establish even-handedness between the measure in question, what it aims to achieve and the trade restrictions it creates.

But this does not mean that the Article allows member states to implement PPM-based trade measures with more freedom. This is because it seems to have concurrently established rigorous standards for a measure to qualify under the chapeau. The chapeau requires that there is a close enough connection, or a ‘sufficient nexus’ with the environmental problem being targeted by the measure, that the measure is not disproportionately broad in its reach, that the ‘means and ends relationship’ between the measure and its is ‘close and real, in order for the Appellate

¹⁷⁹ Ibid at para 159.

Body to be prepared to accept that process-based trade measures.¹⁸⁰ ALL OF these requirements threaten any ‘acceptable overall balance between trade and political difficulties of passing effective environmental legislation’, especially since it seems that it is too oriented around trade with limited engagement with environmental concerns.¹⁸¹

In addition to this, the acceptance of PPM measures as GATT compliant *‘depends on the precise modalities of implementing a scheme; the law does not offer adequate predictability and legal security’*.¹⁸² Since the requirements discussed above may be difficult to meet in practice, they may not translate into a willingness on the part of states to implement measures that can be easily struck down. States will only implement trade measures if they are certain that they will stand up to the scrutiny of the Dispute Settlement Body and requirements it has set out, in fear of any impacted countries successfully challenge it.¹⁸³ But because there is not a lot of certainty around the requirements set out in Art XX, they may not implement any environmental protection policies, for fear of being in a WTO dispute. All of this means that the product/process distinction, and the fact that it limits the role of non-product related PPMs in differentiating between products, still poses a serious obstacle when it comes to the implementation of process based trade measures, even if non-product related PPMs are permissible.¹⁸⁴

4.8. Conclusion- Status of PPMs

At the beginning of this chapter it was stated that there is an assumption was that the WTO does not allow for member states to differentiate between products on the basis of the processes used to create them. However, trade measures regulating non-product-related PPMs (PPMs that look at processes behind the product) have not

¹⁸⁰ Douglas A. Kysar, ‘Preferences for Process: The Process/Product Distinction and the Regulation of Consumer Choice’, Harvard Law Review, Vol. 118, No. 2 (2004) at 547.

¹⁸¹ William J. Snape III and Naomi B. Lefkowitz, ‘Searching for GATT’s Environmental Miranda: Are Process Standards Getting Due Process’, Cornell International Law Journal, Vol. 27 No 3, 777- 815 (1994) at 797.

¹⁸² Thomas Cottier, Renewable Energy and Process and Production Methods, <http://www.wti.org/research/publications/870/renewable-energy-and-process-and-production-methods/> accessed 12 November 2016

¹⁸³ Omar Ranne, ‘More Leeway for Unilateral Trade Measures? The Report of the Appellate Body in the Shrimp-Turtle Case’. INTERECONOMICS, March/April 1999

¹⁸⁴ Douglas A. Kysar, ‘Preferences for Process: The Process/Product Distinction and the Regulation of Consumer Choice’, Harvard Law Review, Vol. 118, No. 2 (2004) at 547-548.

been prohibited by WTO jurisprudence. However, Article III has been interpreted in a way that is unfavourable towards the use of non-product-related PPMs in that the way in which ‘like products’ has been interpreted ‘substantially limits the regulatory space available to construct consistent PPM-based regulations’¹⁸⁵ that is, differentiating products on the basis of how they were made has been made more difficult.

The case law has indicated that there is some flexibility when determining whether imported and domestic products are like, however there seems to have been a strict adherence to the traditional criteria laid out in the Border Tax Adjustment report. In addition to this, the cases have also repeatedly said that likeness must be determined with reference to objective factors and not extraneous ones. This indicates that the panels may be reluctant to look beyond the physical characteristics of products at issue, that they may not be willing to consider the aim/ intent of PPM measures.

The established interpretation of the concept of ‘like product’ in WTO jurisprudence does not *readily* allow product differentiation on the basis of differing PPMs. Regulations around PPMs essentially depend on the qualifications contained in Article XX and as mentioned above, a lot depends on the precise methods of implementing the regulation; WTO law does not provide enough predictability, stability or clearly defined and definite rules which are valued by law makers/ regulators.¹⁸⁶ All of this means that the product/process distinction still poses an obstacle when it comes to the implementation of process based trade measures.

The question remains as to whether this approach is in line with the principle of sustainable development. This thesis will move on to provide an overview of sustainable development and provide a view as to whether it can be reconciled with the approach of the WTO

¹⁸⁵ Rudi Kruse, ‘Process and Production Methods and Burden of Proof: A Procedural Limitation of the ‘Like’ Products Debate’, *International Trade and Business Law Review*, Vol. 16 (2013) 377-393 at 380.

¹⁸⁶ Thomas Cottier, *Renewable Energy and Process and Production Methods*, <http://www.wti.org/research/publications/870/renewable-energy-and-process-and-production-methods/> accessed 12 November 2016

CHAPTER 5- IS THERE A CONFLICT BETWEEN THE WTO POLICY VERSUS SUSTAINABLE DEVELOPMENT AND THE ABILITY OF STATES TO SET THEIR OWN ENVIRONMENTAL POLICY?

5.1 Introduction

National sovereignty provides states with the authority to perform activities other entities simply cannot. This includes defence of territorial integrity, the creation and implementation of domestic laws as well as the provision of public goods like social services and a clean environment. Because of this authority, Agenda 21 recommends that national governments ‘ensure socially responsible economic development while protecting the resource base and the environment for the benefit of future generations’.¹⁸⁷ This awareness is at the core of sustainable development and highlights the essential role that governments have to play in nurturing sustainable development. It pushes for governments to ‘enact effective environmental legislation’, including trade related environmental standards as part of international environmental goals.¹⁸⁸

Because governments are responsible for moving legal and organizational structures towards sustainable development, they need to be able to formulate and implement laws and policies that guide private and governmental decisions towards sustainable development, and to regularly modify them when appropriate in order to improve their efficacy.¹⁸⁹ Agenda 21 recognises the importance of these regulations and emphasises that markets and governmental economic policies have to play an expanded role in the move towards sustainable development.¹⁹⁰

As established above, non-product-related PPM requirements have not been prohibited by the WTO when it comes to determining likeness. However, Article III and XX have been interpreted in a way that is unfavourable towards the use of non-product-related PPMs, as a way of differentiating between products, in that the way in which the idea of ‘like products’ has been interpreted “substantially limits the

¹⁸⁷ Agenda 21, U.N. Conference on Environment and Development, U.N. Doc. A/Conf. 151/26/Rev.1 at para 8.7.

¹⁸⁸ John C Dernbach, ‘Sustainable Development as a Framework for National Governance’ Case Western Reserve Law Review, Vol. 49 No 1 (1998) at 36.

¹⁸⁹ Ibid at 63.

¹⁹⁰ Ibid at 77.

regulatory space available to construct consistent PPM-based regulations¹⁹¹ This conclusion is based on the fact that production and manufacturer characteristic standards have been consistently held not to apply in Article III cases. Meaning that PPM regulations that are formulated along these lines would be excluded in the ‘like product’ analysis of Article III. Furthermore, there also seems to be a great reluctance on the part of the Dispute Settlement System to take into account bona fide PPM measures in order to balance them against existing trade interests as a way of justifying them. In addition to this, Article XX does not offer the predictability and legal certainty that would appeals to policy makers.

Does this approach by the WTO undermine sustainable development and the ability of states to make their own environmental policy?

5.2 Contradictions with sustainable development and the prerogative of states to set environmental policy

Earlier in the dissertation, it was shown that an integral part of sustainable development is the principle of integration. That new norms and standards (in this case sustainable development) have to be taken into consideration and given their proper weight.¹⁹² It is argued that the WTO Dispute Settlement Body has not given a high enough priority to the integration of the concept of sustainable development into its policies. It has not been able to find the balance needed between sustainable development and its objective of trade liberalisation, given that the case law discussed above seem to have resolved Article III unfavourably towards PPM regulations by continuing to accept the product and process distinction. This dissertation recognises that there is a need to be watchful of protectionism and discrimination in international trade, but rather than limiting the applicability of PPM based trade measures, the WTO needs to make integrated decisions by balancing the interests at hand. Environmental protection is needed but this mustn’t be at the expense of the goal of trade liberalisation. So, when looking at environmental measures, they must be accepted only if they are not protectionist and purely

¹⁹¹ Rudi Kruse, ‘Process and Production Methods and Burden of Proof: A Procedural Limitation of the ‘Like’ Products Debate’, *International Trade and Business Law Review*, Vol. 16 (2013) 377-393.

¹⁹² Award in the Arbitration regarding the Iron Rhine Railway between the Kingdom of Belgium and the Kingdom of the Netherlands, 27 RIAA (2005) (at para 59)

discriminatory. This examination has to be an important part of the trade/environment/PPM debate.

The aim of Article 3 is to limit protectionism. What this dissertation proposes is that when dealing with trade measures concerned with environmental protection, ‘like products’ need to be defined within the context of the trade provision in question. PPM based trade measures should not be struck down just because there are incidental discriminatory effects on imports. The National Treatment Principle works on the basis that differing treatment of imported and domestic products is susceptible to protectionist treatment, but this premise is not always true: there are justifiable policy reasons for treating like products differently that are not protectionist. Adopting an approach like this would not compromise the mandate of the WTO since it would allow the panels to keep in the front of its mind that this measure must not be applied so as to afford protection to domestic measures. An approach like this would allow the WTO to balance the need to stamp out protectionist measures while balancing them against environmental interests. Whether the measure in question distinguished between imported and domestic products for valid public policy reasons or for protectionist reasons would be relevant to the question of whether the affected products were ‘like products’. Applying Article III should not be a matter of distinguishing products characteristics from the processes and production methods used to make it; it should be about looking at the policy behind the differentiation. You would have to look at whether the regulation in question is primarily aimed at environmental conservation and whether there is a sense of even-handedness or proportionality in the way the regulation is imposed. Once again this would be about finding a balance/ looking to reconcile the competing interests of the parties.

This thesis argues for the adoption of the approach provided by the Appellate Body in *Japan- Taxes on Alcoholic Beverages*¹⁹³ where the Appellate Body stated that,

‘no one approach to exercising judgement will be appropriate for all cases...The concept of “likeness” is a relative one that evokes the images of an accordion. The accordion of “likeness” stretched and squeezes in different

¹⁹³ *Japan- Taxes on Alcoholic Beverages* WT/DS11/AB/R (1996).

places as different provisions of the WTO Agreement are applied. The width of the accordion in any one of those places must be determined by the particular terms ‘like’ is encountered as well as by the context and the circumstances that prevail in any given case to which that provision may apply’.¹⁹⁴

This approach is similar to that of Howse and Regan who argue that the ‘sensible consideration of aim and effects is essential to identifying protectionism and limiting protectionism’.¹⁹⁵ In the wake of the case law setting out the WTO’s approach to dealing with PPMs, alternative ways of interpreting Article III have been offered up-ways that readily allow PPMs to be part of the ‘like product’ analysis.¹⁹⁶ Howse and Regan¹⁹⁷ argue that the text of the GATT does not support an interpretation of the product/process distinction and advocate for the revival of the ‘aims and effects’ test which looks at the ‘regulatory intent of the legislator’- that panels should consider the aim and effect of a regulation in order to determine whether differential treatment of products is GATT compliant.¹⁹⁸ The *Malt Beverages* and the *Taxes on Automobiles* cases introduced into the like product analysis the ‘aims and effects test’, the approach looked to determine whether the measure in issue has a bona fide regulatory approach and whether it has the effect of altering conditions of competition in order to protect its producers.¹⁹⁹ In both cases the panels found that parties could ‘distinguish in their fiscal or regulatory measures between domestic and imported products for *legitimate* policy purposes as long as this distinction did not result in protection (intended or afforded)’.²⁰⁰ This approach would allow for regulatory objectives to be invoked in the Article III analysis.²⁰¹

¹⁹⁴ Ibid note 193 at 114.

¹⁹⁵ Robert Howse and Donald Regan, ‘The Product/Process Distinction- An Illusory Basis for Disciplining “Unilateralism” in Trade Policy’, *European Journal of International Law* Vol. 11 No 2 (2000) 249-289 at 268.

¹⁹⁶ Robert Howse and Donald Regan, ‘The Product/Process Distinction- An Illusory Basis for Disciplining “Unilateralism” in Trade Policy’, *European Journal of International Law* Vol. 11 No 2 (2000) 249-289 and Jason Potts, ‘The legality of PPMS under the GATT: Challenges and Opportunities for Sustainable Trade Policy’, *International Institute for Sustainable Development* (2008).

¹⁹⁷ Ibid note 195 at 264- 268.

¹⁹⁸ Reinhard Quick and Christian Lau, ‘Environmentally Motivated Tax Distinctions and WTO Law: The European Commission’s Green Paper on Integrated Product Policy in Light of the ‘like product’ and ‘PPM’ Debate’, *Journal of International Economic Law* Vol. 6 No.2 (2003) 419-458 at 426.

¹⁹⁹ Ibid.

²⁰⁰ Ibid.

²⁰¹ Ibid.

However, the Japan- Alcohol case rejected this approach in favour of an objective analysis of whether the measure was applied so as to afford protection.²⁰² This seems to defeat the goal of sustainable development as it dismisses the potential for a more contextualised approach to the like product analysis. By examining the regulatory purpose of the measure in question, it would allow panels/ appellate bodies to ‘respond with more flexibility to common concern policies and provide openness for PPMs’.²⁰³ It would bring the WTO closer to its policy goal of sustainable development while still promoting trade liberalisation. It is a balancing act that has the potential to be successful and would not use the mechanical product process distinction. This call for flexibility was restated in the *EC Asbestos* case which called for all criteria to be considered separately and weighing all relevant evidence. This could provide some space for development of WTO case law, especially if the Dispute Settlement System adopts the aims and effects test.

It would also allow for states to take the lead when it comes to implementing strategies for sustainable consumption and production patterns. The ability to make trade measures based on process and production methods is a vital potential weapon for environmental protection. ‘Most commentators recognise that process-based trade measures also are capable of expressing well-grounded and sincerely held concerns of consumers, such that restricting their use would prevent not only disguised protectionism, but also a host of legitimate democratic aims’.²⁰⁴ If a nation fails to act to protect the environment, other countries may have limited trade leverage to encourage better environmental practices...simply waiting for the producing country to ‘clean up its act’ is likely to be insufficient.²⁰⁵

A similar approach to that offered up by the ‘aims and effects’ tests is the call for an approach that takes ‘into account the design, architecture and structure of the measure. This provides some leeway with regard to PPMs. As long as the measures aim is not blatant protectionism in favour of domestic products, the regulatory approach could be used as part of the likeness analysis thus enabling PPMs to be part

²⁰² Ibid note 193 at 18.

²⁰³ Veronique Bastien, *Developing Countries and Challenges of Climate Change-related PPMs within WTO Institutions*, LLM (University of Toronto) (2013) at 34.

²⁰⁴ Douglas A. Kysar, ‘Preferences for Process: The Process/Product Distinction and the Regulation of Consumer Choice’, *Harvard Law Review*, Vol. 118, No. 2 (2004) 525-642.

²⁰⁵ Jonathan M. Harris, ‘Trade and the Environment’ <http://ase.tufts.edu/gdae> accessed 9 February 2017.

of the element to be considered based on the objectives they embody'.²⁰⁶ An approach such as this would exclude the mechanical product/ process distinction and still provide a way of identifying and limiting protectionism since it would require an analysis of the design of the measure in question. It would also provide some flexibility by allowing the environmental policy subject to while still looking out for any intended protectionist behaviour and promoting the goal of sustainable developments.

It is also important to recognise that others have argued that more focus needs to be placed on the way that measures and state policies are formulated in order to avoid being GATT incompatible.²⁰⁷ This approach puts the onus of state to craft their regulations and laws in a way that fits with WTO jurisprudence. 'Consistency with Art. I and/or Art. III will largely turn on the selection of appropriate product definitions in PPM policy design and implementation. Since Art. I and Art. III obligations apply only across "like products," differential treatment based on PPMs becomes a non-issue so long as a set of specified PPMs are sufficient to qualify products as "unlike" their non-PPM counterparts'.²⁰⁸

5.3 Conclusion

The policy adopted by the WTO seems to be in direct contradiction with the aim of sustainable development that states take on the responsibility of designing and implementing environmental protection policies that take into account the damage done by production processes and methods. This is largely because they are limited in how they can design PPMs. 'Although WTO law does not directly dictate what the goals of a government's environmental policy should be or what instruments can be used, the scope of WTO law is broad enough to influence those choices...WTO law removes policy space from governments to use environmental measures in particular ways.'²⁰⁹ They no longer have the space in which to design policy

²⁰⁶ Veronique Bastien, *Developing Countries and Challenges of Climate Change-related PPMs within WTO Institutions*, LLM (University of Toronto) (2013) at 34

²⁰⁷ Jason Potts, 'The legality of PPMS under the GATT: Challenges and Opportunities for Sustainable Trade Policy', *International Institute for Sustainable Development* (2008) at 29.

²⁰⁸ *Ibid* at 30.

²⁰⁹ Steve Charnovitz, 'The Law of Environmental PPMs in the WTO: Debunking the Myth of Illegality', *The Yale Journal of International Law*. Vol. 27 No. 59. (2002) 59-110 at 19-20.

instruments that help the market to internalise market activity in ways that support sustainable development.²¹⁰ This thinking is in line with arguments that ‘implicit understandings of the GATT illegality of PPM policy, has led to a general reluctance to consider such initiatives among the range of viable policy options for meeting any given policy objectives’.²¹¹

Because of this and the uncertainty around what policies will pass muster under both Articles III and XX, states will not risk the chance of being part of a trade dispute and may shy away from making environmental laws/ policies with implications in international trade law. The constant threat of a WTO challenge will inhibit initiatives to enforce PPM regulations. We need a definitive statement/ definition on what like products are because as it stands, its wording does not prohibit the inclusion of production processes as a way of determining likeness. Governments will be unlikely to set optimal environmental policies if they are part of the WTO because the use of trade instruments will be constrained by the findings of the DSB.²¹²

This will mean that states cannot effectively communicate the environmental costs of certain economic activities. This means that any negative externalities and inefficient processes involved in the production of goods are not reflected in the cost of the product, meaning that states lose out on the opportunity to change economic actors’ behaviour in this regard.²¹³

In order for the WTO to bring its policies in line with sustainable development it is necessary for it find a balance between trade and the protection of the environment. It needs to add more urgency in its legal findings when it is dealing with environmental measures. This is not an argument for the complete overhaul of the WTO system, but an argument that pushes for the WTO Dispute Settlement System to embrace the balancing act that is emblematic of sustainable development.

²¹⁰ Jason Potts, ‘The legality of PPMS under the GATT: Challenges and Opportunities for Sustainable Trade Policy’, International Institute for Sustainable Development (2008) at 4.

²¹¹ Jason Potts, ‘The legality of PPMS under the GATT: Challenges and Opportunities for Sustainable Trade Policy’, International Institute for Sustainable Development (2008) at 29.

²¹² Ian Sheldon, Trade and Environmental Policy: A Race to the Bottom?’ *Journal of Agricultural Economics*, Vol. 57, No. 3, 2006, 365–392 at 367.

²¹³ Environmental Issues in the World Trade Organization Chad P. Bown and Rachel McCulloch Forthcoming in *The Kluwer Companion to the World Trade Organization*, A. Appleton, P. Macrory and M. Plummer, eds. Dordrecht: Kluwer. (2003) at 9

CHAPTER 6- CONCLUSION

This dissertation has shown that the premise of sustainable development is that economic growth, which is largely driven by consumption, is not sustainable and that as such one of the key goals of sustainable development is achieving sustainable consumption and production patterns. It has pointed to a number of international meetings and instruments that advocate for more focus to be placed on the ‘demand for natural resources generated by unsustainable consumption and to the efficient use of those resources consistent with the goal of minimizing resource depletion and reducing pollution’.²¹⁴ In identifying the objective of encouraging patterns of consumption and production that will reduce environmental pressure and meet the needs of humanity, responsibility is placed on government to encourage efficiency in production processes and decrease wasteful consumption. A way of doing this that has emerged has been through the regulation and taxation of private companies as a way of making the internalise negative environmental externalities that result from their economic activities. More specifically, governments will adopt sustainability strategies that look to regulate market failures in terms of production by regulating products and the processes they use. Trade related measures are a useful tool in the move towards sustainable development because of their ability to influence economic activity on an international scale and in doing so ‘encourage substantive changes across multiple jurisdictions’.²¹⁵ As such, PPM policy represents an important opportunity for implementing the chapter 4 of Agenda 21 and the integration of sustainable development within the international trade framework more generally.

The Dispute Settlement Body has accepted that the WTO Agreement, which clearly adopts sustainable development as an objective of the organisation, has to be interpreted in line with its preamble.²¹⁶ In the Shrimp-Turtle case, the Appellate Body recognised and referred to instruments in International Environmental Law in discussing unilateral actions on the part of states. So why would the WTO policy be seen as contrary to the goal of sustainable development and states’ freedom to adopt environmental protection measures?

²¹⁴ Agenda 21, U.N. Conference on Environment and Development, U.N. Doc. A/Conf. 151/26/Rev.1 at para 4.5.

²¹⁵ Jason Potts, ‘The legality of PPMs under the GATT: Challenges and Opportunities for Sustainable Trade Policy’, International Institute for Sustainable Development (2008) at 29.

²¹⁶ *United States- Import Prohibition of Certain Shrimp and Shrimp Products* [WT/DS58/AB/RW](#) (2001).

One of the cornerstones of the WTO is the principle of non-discrimination. However, its application is qualified by the requirement that non-discrimination only applies where ‘like products’ are involved. It is the concept of ‘like products’ that has caused difficulty in the trade-environment debate when it comes to regulations that control non-product related PPMs. This is because the Dispute Settlement Body has drawn a distinction between products and process used to make those products when determining whether products are ‘like’.

While it was originally assumed that differentiating products on the basis of the processes used to make them had been prohibited by the WTO, the dissertation has made it clear that that is not the case. However, the analysis of WTO case law has shown that Article III has been interpreted in a way that is unfavourable towards the use of non-product-related PPMs in that the way in which ‘like products’ has been interpreted as limiting the space in which consistent PPM-based regulations may be constructed, that is, differentiating products on the basis of how they were made has been made harder.²¹⁷ This conclusion is based on the fact that production and manufacturer characteristic standards have been consistently held to be outside the scope of Article III.

The case law has indicated that there is some flexibility when determining whether imported and domestic products are like, however panels and Appellate bodies have paid particular focus to ‘objective factors’ when making a likeness determination; this indicates that the panels may be reluctant look beyond the physical characteristics of products at issue, that they may not be willing to consider the ‘intent’ behind PPM measures. The regulations around PPMs essentially depend on the qualifications contained in Article XX and as mentioned above, a lot depends on the precise methods of implementing the regulation; and WTO law does not provide enough predictability for regulators.²¹⁸ All of this means that the product/process distinction still poses an obstacle when it comes to the implementation of process based trade measures.

²¹⁷ Rudi Kruse, ‘Process and Production Methods and Burden of Proof: A Procedural Limitation of the ‘Like’ Products Debate’, *International Trade and Business Law Review*, Vol. 16 (2013) 377-393.

²¹⁸ Thomas Cottier, *Renewable Energy and Process and Production Methods*, <http://www.wti.org/research/publications/870/renewable-energy-and-process-and-production-methods/> accessed 12 November 2016.

This dissertation argues that WTO law as it exists to address trade measures regulating non-product related PPMs, seems to be in direct contradiction with the aim of sustainable development which requires that states take on the responsibility of designing and implementing environmental protection policies that take into account the damage done by production processes and methods. This is largely because they are limited in how they can design PPMs. ‘Although WTO law does not directly dictate what the goals of a government’s environmental policy should be or what instruments can be used, the scope of WTO law is broad enough to influence those choices...WTO law removes policy space from governments to use environmental measures in particular ways.’²¹⁹ They no longer have the space in which to design policy instruments that help the market to internalise market activity in ways that support sustainable development.²²⁰

Because of this, this dissertation argues that decisions made by the Dispute Settlement Body must be made in light of contemporary concerns and these include the goals of sustainable development and the preservation of the environment. The WTO has recognised sustainable development (in the preamble to the WTO Agreement, The Doha Declaration and some of the cases discussed above) as a broad global objective as well as a part of the mandate of the international economic systems- but its approach needs to respond to the dynamic nature of environmental concerns. It needs to embrace the integrative approach espoused by sustainable development and seen in international tribunals. Doing so would enable it to make more well-rounded decisions that can weigh environmental interests and those of pursuing the liberalisation of international trade. It would enable it to look at the aim and purpose of PPM based trade and analyse whether they are bona fide or are simply protectionist. It must make sustainable consumption and production patterns a part of the way it interprets what like products are by making process and production methods a way of distinguishing between products so as to help further the goal of sustainable development.

²¹⁹ Steve Charnovitz, ‘A new WTO paradigm for trade and the environment’, *Singapore Year Book of International Law and Contributors*, (2007) 15-40 at 19-20.

²²⁰ *Ibid* note 215 at 4.

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